

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & Affidavit of Filing

77-1409

To be argued by
SUSAN E. SHEPARD

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1409

UNITED STATES OF AMERICA,

—against—

BLAIR WATSON,

Appellee

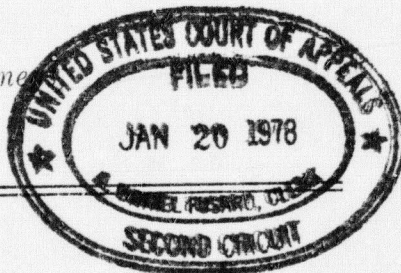
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Eastern District of New York.*

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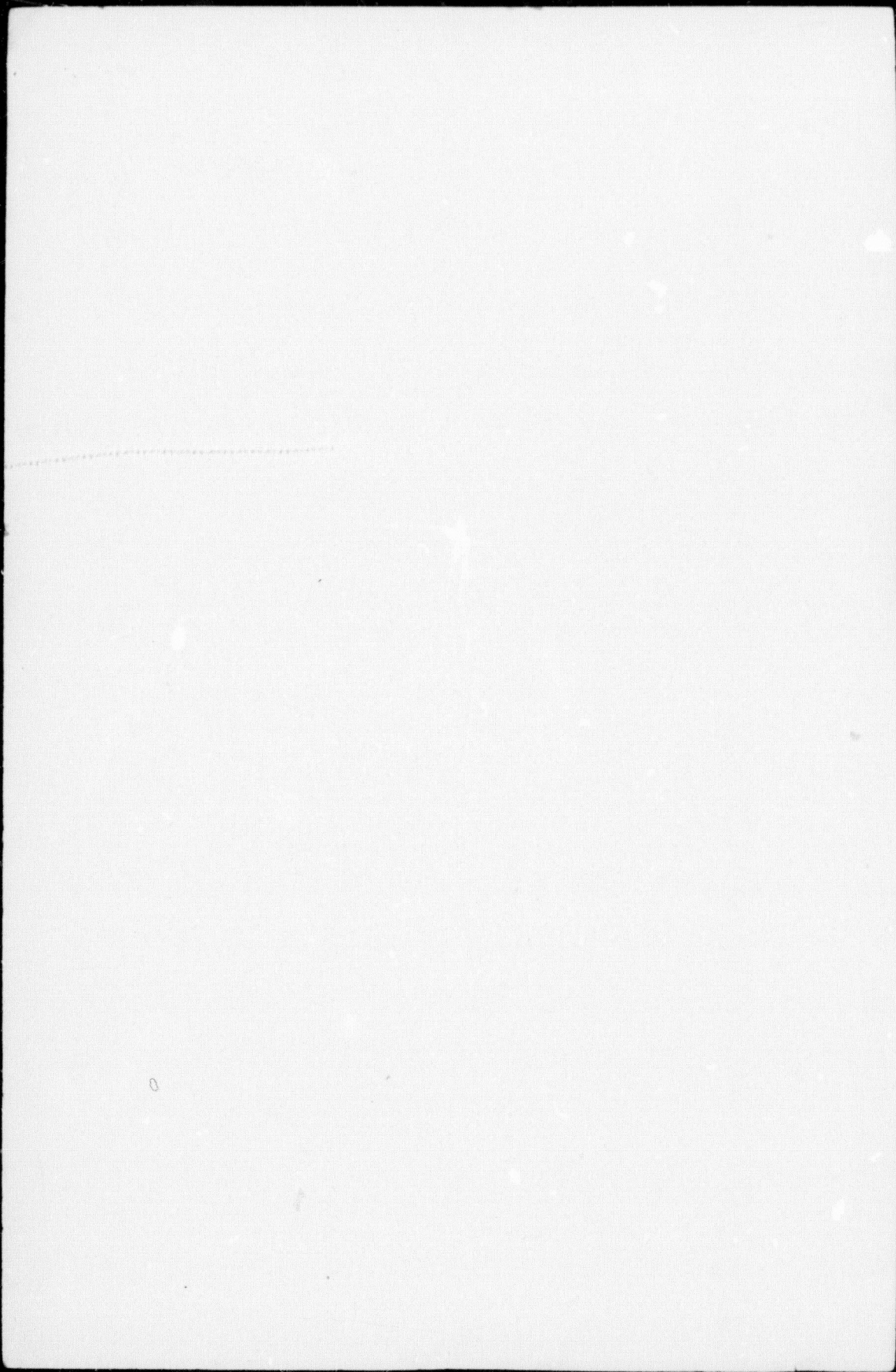


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
A. The Government's Case	2
B. The Identifications	4
ARGUMENT:	
POINT I—The District Court did not err in admitting the in-court identification by a witness who viewed a lineup outside the presence of defense counsel since defense counsel was present at the lineup itself	7
POINT II—Alternatively, Tria's identification testimony had an "independent basis"	11
CONCLUSION	13

TABLE OF AUTHORITIES

<i>Doss v. United States</i> , 431 F.2d 601 (9th Cir. 1970) .	7, 9
<i>Moore v. Illinois</i> , — U.S. —, 46 U.S.L.W. 4050 (December 12, 1977)	8
<i>Neil v. Biggers</i> , 409 U.S. 188 (1972)	12
<i>United States ex rel. Gonzalez v. Zelker</i> , 477 F.2d 797 (2d Cir.), cert. denied, 414 U.S. 924 (1973) ..	12
<i>United States v. Ash</i> , 413 U.S. 300 (1973)	9, 10
<i>United States v. Bennett</i> , 409 F.2d 888 (2d Cir. 1969)	9, 10

	PAGE
<i>United States v. Boston</i> , 508 F.2d 1171 (2d Cir. 1974), <i>cert. denied</i> , 421 U.S. 1001 (1975)	12
<i>United States v. Counts</i> , 471 F.2d 422 (2d Cir.), <i>cert. denied</i> , 411 U.S. 935 (1973)	9
<i>United States v. Tolliver</i> , Dkt. No. 77-1017, Slip. Op. 863 (2d Cir. January 3, 1978)	7, 8, 9, 10, 11
<i>United States v. Tramunti</i> , 500 F.2d 1334 (2d Cir.), <i>cert. denied</i> , 419 U.S. 1079 (1974)	12
<i>United States v. Wade</i> , 388 U.S. 218 (1967) . .	4, 8, 9, 10

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Appellee,

—against—

BLAIR WATSON,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Blair Watson appeals from a judgment of conviction entered June 30, 1977, after a jury trial in the United States District Court for the Eastern District of New York (Platt, J.). Appellant was convicted on each of the two counts in the indictment: bank robbery by force or intimidation, in violation of 18 United States Code, Sections 2113(a) and 2 (Count 1); and using a dangerous weapon and placing lives in jeopardy during the course of the robbery, in violation of 18 U.S.C. §§ 2113(d) and 2 (Count 2). Appellant was sentenced to a term of twenty years' imprisonment on Count 2.

On this appeal, appellant urges the Court to reverse his conviction and vacate his sentence (or, alternately, to remand the case for a "*Wade*" hearing) on two grounds. First, he contends that his Constitutional rights were violated because his defense counsel, although present at a

lineup, was excluded from the adjoining room where an identifying witness viewed the lineup. Second, he argues that it was error for the trial court to allow the witness to make an in-court identification without first determining that there was a sufficient basis independent of the allegedly tainted lineup.

Statement of the Case

A. The Government's Case

The evidence disclosed that on February 22, 1977, the Citibank at 70-78 Kissena Blvd., Queens, New York, was robbed of over \$11,000 in currency. Alfred DiFrancesco, who was working as operations supervisor at that branch, testified that he was at his desk at the front of the bank near the door at approximately 9:45 A.M. that day when he looked up and saw a black male—later positively identified by DiFrancesco as appellant—looking around the bank. DiFrancesco got up from his desk, walked to the man, and asked if he could help him. Turning, appellant said, "cash advance", and DiFrancesco, pointing, told him to stand in a nearby line. During the exchange, DiFrancesco saw appellant's face for six to seven seconds, and recalled that he was light-skinned, young, with "very, very piercing" eyes and that he wore a turtleneck sweater. (T₁ 81-83).^{*} Inasmuch as it was a very warm day, DiFrancesco thought it was unusual that the individual wore a sweater. (T₁ 125). When DiFrancesco started back to his desk, he noticed that although there were only about three customers in the line he had indicated to appellant, appellant had left the bank. His curiosity

^{*} Numerical references in parenthesis refer to page numbers of the trial transcript. When such numbers are preceded by "T₁", they refer to the transcript dated June 28. Numbers preceded by "T₂" refer to the June 29 transcript.

aroused, DiFrancesco went to the window and looked out but did not see appellant. (T₁ 83-84).

DiFrancesco thereafter went to his desk, picked up some checks and went to a table behind the tellers' counter in the rear of the bank to complete some deposit tickets. There were several other people behind the counter, including tellers Nurit Reshef and Laura Tria, both of whom testified at trial. Suddenly there was the sound of running and shouting, and witnesses saw a man waving a shotgun back and forth across the tellers' counter and shouting that everyone should move away from the counter. DiFrancesco recognized the man with the shotgun as the same man who two to three minutes before had asked for the cash advance. The man was not wearing anything on his face. (T₁ 42-43, 86-88; T₂ 23-26). Next appellant vaulted over the counter and, pointing the shotgun at Reshef and Tria, ordered them to get down. They squatted by the rear wall while DiFrancesco, still standing, watched what was happening. Appellant went over to DiFrancesco and put the shotgun to his head. Then he went back to where Reshef and Tria were squatting, eight to ten feet away. During this time, he was talking and shouting. He told Reshef, who testified that appellant "resembled" him, "Don't look at me" and removed her eyeglasses, later smashing them and DiFrancesco's glasses as well. Several times appellant attempted to pull his turtleneck up over his face, but it kept falling down. (T₁ 43-46, 94-95; T₂ 26-31). He took Reshef's purse and put it into a white bag carried by a second young black male who was emptying cash from the tellers' drawers into the bag. (T₁ 47, 90-91). DiFrancesco recalled noticing at some point a third individual, in another part of the bank, carrying a handgun. (T₁ 92).

Then appellant walked over to DiFrancesco a second time, said, "I told you to get down" and struck him across the temple with his right arm. The shotgun was in his

left hand. DiFrancesco fell to the floor where again he was able to watch what was going on. (T₁ 92-94). Appellant returned to DiFrancesco a third time, took his keys and said, "Cover your face." DiFrancesco put his hands over his face but was still able to watch. With that, the robbers climbed over the counter and left the bank. (T₁ 95-96). The men were in the bank three to five minutes. DiFrancesco testified he saw appellant's face for fully two minutes of that time and stated he was certain appellant was the robber with the shotgun, "a hundred percent, guaranteed, no doubt in my mind." (T₁ 97-98). Tria, who positively identified appellant as the bank robber, testified that at one point she looked at his face six or seven seconds (T₂ 27).

B. The Identifications

The evidence against appellant at trial consisted of identification testimony by three witnesses—DiFrancesco, Reshef, and Tria. Before trial, the Government informed the Court and defense counsel that the Government would rely on identification testimony by two witnesses who had previously identified appellant from a photo spread and lineup.* The Government invited defense counsel to have a *Wade* hearing with respect to the prior identifications.** Defense counsel stated that, after speaking with the lawyer who represented appellant at the time of the earlier lineup, he had no objection to that lineup. With respect to the photo spread, his only objection was that the photos allegedly looked like "mug shots" and would prejudice the jury. (T₁ 3-4). The Court ordered that a strip of tape be put across each (where appellant's picture had an identification number) and denied any further

* At that point, Tria, who was living in California, had not viewed either a photo spread or lineup.

** See *United States v. Wade*, 388 U.S. 218 (1967).

objection to the photographs on that ground. (T₁ 17). Even though defense counsel made no objection to the photo spread, as altered, or the identifications, the Government proceeded to call the two witnesses who would testify to prior identifications.

DiFrancesco testified to what he observed at the time of the robbery, and, on cross-examination, he positively identified appellant as the person he had observed in the bank with a gun. He described the procedure followed at the time he viewed the photo spread and identified the photographs, including the photograph of appellant which he picked out. (T₁ 5-16). At the conclusion of his testimony, the Court ruled that the spread was not suggestive, adding, "If he picked out the right person, which apparently he did, it's a good job of identification." (T₁ 16-17).

Reshef testified to what she observed at the time of the robbery, and stated that appellant resembled the robber with the gun. She described the procedure by which the agents exhibited the photo spread to her. After identifying the photographs at the hearing, she picked out the photograph of appellant as the one she had selected because it "most closely resembles" the robber with the shotgun. (T₁ 18-22). At the end of her cross-examination, defense counsel stated that, "There is no suggestiveness to raise an argument with." (T₁ 27).

Before the start of the afternoon session on the first trial day, the Government informed the Court and defense counsel that a potential witness (Tria) had been located in California and that she was presently on her way to New York. The Government further informed the Court that a lineup had been arranged for the next morning before the start of trial in order to give the witness an opportunity to make an identification prior to any attempted in-court identification. Defense counsel objected. (T₁ 61-64). The Court overruled the objection. (T₁ 138).

The lineup was conducted the following morning. Defense counsel was present the entire time, viewing and listening to the lineup procedure from one of two rooms adjoining the lineup room. Tria viewed the lineup from the other adjoining room along with an FBI agent and the Assistant United States Attorney. She testified thereafter that, when she viewed the lineup, she thought to herself that appellant was the robber in question but that she did not say so until a few minutes later, when she looked at the photograph of the lineup and decided with certainty. (T₂ 40-47, 58). When the trial resumed after the lineup, defense counsel raised four objections. First, he objected to the fact that the lineup was not identical to the lineup viewed earlier by DiFrancesco. The Court overruled that objection. (T₂ 2-3). Next he asked the Court to examine the photograph of the lineup and, contending that appellant had the lightest complexion, objected to the composition of the lineup. The Court also overruled that objection (T₂ 3). Defense counsel then asked the Court to have the lineup itself produced for the jury to inspect, and it was. (T₂ 4, 8, 18-19). Finally, the Court overruled his objection to being excluded from the room where the witness stood when she viewed the lineup. (T₂ 8-11). At no time did defense counsel request a *Wade* hearing or request an opportunity to interview the witness, Tria, whose identity was known to him. (T₂ 18).

ARGUMENT

POINT I

The District Court did not err in admitting the in-court identification by a witness who viewed a lineup outside the presence of defense counsel since defense counsel was present at the lineup itself.

A. In *United States v. Tolliver*, Dkt. No. 77-1017, Slip Op. 863 (2d Cir. January 3, 1978), this Court held that a defendant's right to confrontation and assistance of counsel does not include a right to have counsel present when a witness makes the actual lineup identification if the defendant is not present. In *Tolliver*, the identification was made in a post-lineup interview with the FBI and the prosecutor. The Court stated that it joined certain other circuits in holding that the actual confrontation between the defendant and the witness was the only critical stage requiring the presence of counsel.

In the present case, counsel was present at the lineup for the full time the identifying witness viewed it. As in *Tolliver*, the actual identification occurred when defense counsel was not present—when the witness viewed a photograph of the lineup later and positively identified appellant. Unlike *Tolliver*, at the time the witness viewed the lineup, defense counsel was in an adjoining viewing room rather than the same room where the witness viewed the lineup.

We submit that it was not error to exclude defense counsel from the presence of a witness viewing a lineup and from the actual identification where defense counsel was present at the lineup itself. Indeed, in *Doss v. United States*, 431 F.2d 601 (9th Cir. 1970)—which this

Court cited with approval in *Tolliver*—the Ninth Circuit ruled that it was not constitutional error to admit the identification of a witness who both viewed the lineup and made the identification outside the presence of defense counsel, since counsel was present at the lineup itself.

That interpretation of the Sixth Amendment is supported by decisions of the Supreme Court concerning a defendant's right to counsel at pretrial identifications. In *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court interpreted the Sixth Amendment to require the presence of counsel at lineups. See also, *Moore v. Illinois*, — U.S. —, 46 U.S.L.W. 4050 (December 12, 1977). But, as this Court noted in *Tolliver*, the Court did not say when a lineup ended or what precisely counsel's role was to be:

It can be argued that a line-up is not finished until the witness has declared whether or not he can identify a particular person as the perpetrator of the crime. . . . On the other hand, it can be maintained that the purpose for which counsel must be present is essentially to see that the line-up procedure is itself adequate to avoid improper suggestion, such as the wearing of differentiating clothes, or a disparity in appearance between the other persons in the lineup and the suspect himself. Slip Op. at 868-69.

By its decision in *Tolliver*, this Court rejected the first position—that counsel was required to be present through identification—and adopted the view that the essential purpose for presence of counsel is to observe and monitor the lineup itself. Appellant reads *Wade* too broadly in construing it to require that defense counsel be present with a witness when he views the lineup. Rather, we submit that, in light of *Wade* and

Tolliver, defense counsel need be present only at the lineup itself and not with the witness viewing the lineup from a separate room.

This reading of *Wade* finds additional support in the Court's opinion in that case. The Court there was concerned that counsel was necessary because of the difficulty of reconstructing the lineup itself so that the jury could judge its fairness at trial. The Court emphasized that the presence of counsel, who would be especially sensitive to defects in the lineup, would aid the defendant in reconstructing the lineup—and avert prejudice in the procedure itself. Indeed, the Court interpreted the main concerns of *Wade* in this fashion in *United States v. Ash*, 413 U.S. 300 (1973). In *Ash*, the Court held that defense counsel did not have to be present during a post-indictment photo spread identification because it was not a 'critical' stage.* The reason *Wade* required counsel at a lineup, the Court said, was to aid accurate reconstruction at trial (413 U.S. at 316):

If accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be "critical"

Further, as the Ninth Circuit observed in discussing *Wade* in *Doss v. United States*, *supra*, the possible dangers of improper verbal suggestion while the witness views a lineup from an adjoining room are substantially diminished by the mechanism of cross-examination (431 F.2d at 603-04):

* This court had earlier reached the same result in *United States v. Bennett*, 409 F.2d 888, 900 (2d Cir. 1969). See, similarly, *United States v. Counts*, 471 F.2d 422 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973).

Significantly the Court [in *Wade*] noted that cross-examination at the trial often affords an adequate means to protect the accused but that a witness at a lineup can be subjected to subtle influence of which he may not be aware—for example, the composition of the lineup, distinctive dress of the suspect, etc. Cross-examination might very well not suffice to disclose such covert improprieties as those mentioned in *Wade*, but we do not believe that the ordinary witness is so unlikely to be schooled in the detection of influences, consisting of verbal suggestions, that he could not recall them on cross-examination. In sum, we conclude that *Wade* does not support appellant, that the ordinary witness is capable of recalling and recounting conversations concerning the identity of a suspect and that the prosecution need not, in effect, permit defense counsel to “sit in” on conferences with prospective witnesses.

In the present case defense counsel was present to fully observe and monitor the lineup procedure and so to inform the Court of any prejudice to the defendant in the lineup itself, as required by *Wade* and *Ash*. The fact that he was not present with the witness Tria when she viewed the lineup or when she made the identification did not, we submit, require the exclusion of Tria’s identification.*

* The Government does not deny that there is greater opportunity for suggestion when a witness views a lineup out of the presence of defense counsel. However, we contend that that does not make exclusion of defense counsel constitutional error. Indeed, this Court reached the same conclusion with respect to photo spreads in *Bennett, supra* at 900, and with respect to post-lineup interviews in *Tolliver*.

We would also note that there are important reasons for excluding defense counsel as well as the defendant from the

[Footnote continued on following page]

B. In any event, even without Tria's testimony the Government's evidence against appellant included the identifications of two eye-witnesses. DiFrancesco positively identified appellant and testified that he studied appellant's face for several minutes during the robbery and fully observed his actions throughout that time. DiFrancesco's testimony was supported by the identification testimony of Reshef who stated that appellant resembled the same robber. The error, if any, in the admission of Tria's in-court identification was therefore harmless.

POINT II

Alternatively, Tria's identification testimony had an "independent basis".

Inasmuch as the lineup procedure did not violate the Sixth Amendments rights of appellant, the identification testimony of Tria was properly admitted.

Further, we submit that regardless of the legality of the lineup, the identification of appellant by Tria was properly admitted into evidence because the record shows that it had a basis independent of the lineup. The Supreme Court and this Court have both held that even where a witness has identified a defendant through a "show up" or through viewing a photo of a defendant, and

room in which the witness views the lineup. Eye-witnesses to crime are often extremely frightened by making lineup identifications and the witness's fears should not be aggravated by the immediate presence of the defendant or of his lawyer.

The remedy suggested by the Court in *Tolliver*—that such sessions be recorded—eliminates the possible problem of improper suggestion. Although that procedure was not followed in the present case, the Court in *Tolliver* stated (at note 4) that it did not intend its ruling to have retrospective application.

even when the photo was shown alone and not made part of a spread, an in-court identification of the defendant by the witness is permitted as long as the witness had a strong independent recollection of the defendant from viewing the defendant at the time of the crime. *Neil v. Biggers*, 409 U.S. 188, 198-201 (1972); *United States v. Boston*, 508 F.2d 1171 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States ex rel. Gonzales v. Zelker*, 477 F.2d 797, 801 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973). In the instant case, it is clear from the record that there was an independent basis for Tria's in-court identification. She stated that at one point she viewed the bank robber's face for six to seven seconds. She recalled from observation at that time that he was tall, thin, black with a brown complexion, a thin face, a pointed jaw and high cheek bones. (T₂ 27-28). Twice when she identified appellant in court, she stated, "That is the face that I remember." (T₂ 32, 62). Thus, the witness's independent recollection is an additional basis for Tria's in-court identification.

Neither may appellant now complain that the Court allowed Tria's in-court identification without a prior *Wade* hearing. As we have shown, the record demonstrates an independent basis for the identification. Moreover, just as defense counsel did not request a *Wade* hearing with respect to the prior identifications of Reshef and Di-Francesco, he did not ask the Court to make a pretrial determination of whether there was an independent basis for Tria's anticipated in-court identification. Appellant may not now raise an objection that should properly have been made prior to Tria's testimony.

Appellant also contends that it was improper for the District Court to admit Tria's testimony concerning her lineup identification. But whatever the legality of the lineup, appellant should hardly be heard to complain about

the admission of testimony he adduced. All testimony concerning that identification was elicited by defense counsel during cross-examination. (T₂ 40-47).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
January 16, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19th day of January 19 78 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Peter Passalacgria, Esq.

32 Court St.

Brooklyn, N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East,
~~Manhattan~~ Borough of Brooklyn, County
of Kings, City of New York.

Barbara Allen

Sworn to before me this

19 day of January 19 78

Alga P. Margen

Notary Public, State of New York
No. 24450176
Qualified in Kings County
Expires March 30, 1979